No. 15211

United States Court of Appeals
For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant*,

vs.

THE CITY OF TACOMA, a Municipal Corporation, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
THE HONORABLE GEORGE D. BOLDT, *Judge*

REPLY BRIEF OF APPELLANT

MALCOLM S. McLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington
Attorneys for Appellant.

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California
Of Counsel.

THE ARGUS PRESS, SEATTLE

No. 15211

United States Court of Appeals
For the Ninth Circuit

COWLITZ TRIBE OF INDIANS, *Appellant,*

vs.

THE CITY OF TACOMA, a Municipal Corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
THE HONORABLE GEORGE D. BOLDT, *Judge*

REPLY BRIEF OF APPELLANT

MALCOLM S. McLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington
Attorneys for Appellant.

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California
Of Counsel.

THE ARGUS PRESS, SEATTLE

INDEX

CASES CITED

STATUTES

UNITED STATES CONSTITUTION

WASHINGTON STATE CONSTITUTION

ORDINANCE

United States Court of Appeals
For the Ninth Circuit

COWLITZ TRIBE OF INDIANS	*Appellant,*	No. 15211
vs.		
THE CITY OF TACOMA, a Municipal Corporation	*Appellee.*	

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
THE HONORABLE GEORGE D. BOLDT, *Judge*

REPLY BRIEF OF APPELLANT

ARGUMENT

The suit is for an injunction against the appellee who has taken property and rights of property from appellant without compensation and is presently proceeding to build two dams, which will destroy appellant's rights, under a Municipal Ordinance No. 14386 (R. 13-14) which is "State Action" under the 14th Amendment. See *Cuyahoga Power Company v. Akron,* 240 U.S. 462 at 464 (citing *Raymond v. Chicago Union Traction,* 207 U.S. 20, etc.). The appellee has failed to give any notice whatsoever of its unlawful seizure of the rights of appellant, which rights and lands cover several counties (R. 3, 86, 87) in the State of Washington, and this action is to enjoin this unlawful taking.

Appellant challenges appellee to cite one act, law, order, or regulation by Congress or a case in any other

forum which by its terms extinguishes the Indian Title of appellants to the Cowlitz River Watershed.

Indian Title in Washington State

Appellee cites the *Duwamish* case, 79 Ct. Cl. 530, and argues that because appellant is a Non-Treaty Tribe, it has no rights of property under this case. This court is requested to take judicial notice of the following cases in the State of Washington wherein a judgment of liability was obtained by the writer against the United States before the Indian Claims Commission based on "Indian Title":

Non-Treaty Tribes	*Judgment 1955*
Nooksack Tribe v. U.S.A., Dkt. 46—	In excess of 100,000 acres
Muckleshoot Tribe v. U.S.A. Dkt. 98—	In excess of 100,000 acres
Treaty Tribe	*Judgment 1956*
Snohomish Tribe v. U.S.A. Dkt. 125—	In excess of 100,000 acres

That these judgments for "Indian Title" were sustained by the Supreme Court of the United States in *Otoe-Missouria v. U.S.A.,* 131 Ct. Claims 593 (certiorari denied) 76 S.Ct. 82. So appellee is somewhat at a disadvantage in citing the *Duwamish* case as authority for seizing appellant's property (Brief pages 21 and 48).

Out of the welter of Indian cases cited by appellee the issues between the parties as defined by the appellee, are as follows.

Answering Appellee's Contentions

The appellee's basic syllogism is:

1. Aboriginal rights are not protected by the Fifth Amendment, because the United States may deprive Indians of their aboriginally held property without compensation.
2. Therefore aboriginal rights are not protected by the Fourteenth Amendment and the City may deprive the Indians of their property rights.

The City glosses over the following authorities: *United States v. Alcea Band,* 329 U.S. 40, 91 L.ed. 29 at page 33, wherein the court stated:

> "As against any but the sovereign, original Indian title was accorded the protection of complete ownership.";

Again, in the much vaunted *Tee-hit-ton Tribe v. United States,* 348 U.S. 272, 99 L.ed. 314 at pages 320-21, the court stated:

> "This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties * * *."

Certainly, the State of Washington (and its subsidiaries) have no fee interest in the lands in general in the state, because the whole concept of the organization of the state was that the United States reserved all the lands in the state (with certain minor exceptions, *e.g.,* school lands) so that the Federal Government retained in *status quo* all prior rights, *e.g.,* the Olympic National Forest and Park. The Enabling Act establishing the State of Washington 25 Stat. 676.

We were amused at the inadequate discussion of the

Walapai (Santa Fe) case by the appellee. *United States as guardian of the Hualpai Indians v. Santa Fe,* 314 U.S. 339. We must first state that this case is a non-treaty case. Second, it is an aboriginal rights case. Third, the reservation was an executive order reservation, (and therefore, not a Fifth Amendment case) but even so, the decision applied to lands both inside and outside the reservation. Fourth, the aboriginally held *lands* survived the railroad patents. As to much of the lands here involved the City is the Grantee of the railroad. Ergo, the case is four-square an authority for appellants.

Appellee has ignored in OSTRICH FASHION, the holding of the United States Supreme Court in the *Santa Fe* case, *supra*:

> 1) "Occupancy necessary to establish aboriginal possession is a question of fact and is to be determined as any other question of fact" . . . (page 345)
>
> 2) "Nor is it true as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal governmental action" (page 347)
>
> 3) "But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian Wards." (page 354)

Once we conclude that the City is not the United States, then we must conclude the City may not also cavalierly dispossess the Indians. And to do so is to deprive the Indians of their right of occupancy without compensation in violation of the Fourteenth

Amendment. And so the Federal courts have jurisdiction under the *Cuyahoga* etc. cases.

We must discuss the Federal Power Act, 16 USC 791 *et seq.* First, it is designed to regulate the issue of whether a dam should be constructed. It is not designed to provide a forum to determine if some property owner, *e.g.,* a farmer, should be paid for having had his farm inundated. That is why 16 USC 814 gives the licensee a right of eminent domain, *i.e.,* the licensee must not only get a license but must also pay for damages to a property owner adversely affected. Therefore appellee is violating both the Fifth and Fourteenth Amendments.

Second, the Indians were not parties to the proceeding, though known to be exercising their rights on the property.

Third, the Power Act does not *ipso facto* extinguish Indian Title, as appears from the *Walapai* case, as follows:

> "This court has consistently held that, in the absence of express language to the contrary, a Federal grant of public land does not constitute an extinguishment of Indian occupancy right." 314 U.S. 339.

Ownership of Waters and Fishery

Fourth, a word should be said about *Tacoma v. Taxpayers,* 43 Wn.(2d) 468, wherein the court had difficulty in understanding that "running water in a great navigable stream is capable of private ownership * * *." 43 Wn.(2d) 481. The incomparable Mr. Justice Holmes, for an unanimous court, had no such difficulty in

Damon v. Hawaii and *Carter v. Hawaii,* 194 U.S. 154. Exclusive fishing rights are not "monstrous to behold" or difficult to conceive."

> "Occupancy [of land, of fishing rights, or of running water] is a question of fact to be determined as any other question of fact." *Walapai* (Santa Fe) case, 314 U.S. 339, 345.

On a motion to dismiss all of the allegations well pleaded are deemed true so the allegation in the Complaint that plaintiffs own the Cowlitz Watershed, the usufruct, the fishery, the land, and the water by virtue of aboriginal possession or Indian title clearly disposes of appellee's arguments.

The Supreme Court of the State of Washington has no difficulty in deciding that an Indian tribe is capable of the fish in a river. *Pioneer Packing Co. v. Winslow,* 159 Wash. 655 at 662, 294 Pac. 557:

> "... we are of the opinion that in the present case the Quinault Indians own the fish in the Quinault River by the same title (Indian Title) and in the same right as they owned them prior to the time of the making of the treaty, and that the state has no right to interfere with or control their right to take fish from a stream which crosses the reservation."

While this case is distinguishable from the case at bar on the basis of the Treaty it is illustrative of the recognition of the extent and quality of aboriginal ownership or Indian Title.

Railroad Land Grant Patents Expressly Except "Indian Title" and Except All of the River Bottom, River Course, and the Watershed Itself

Referring this court to appellee's (Defendant's Exhibit 1, R. 101, item 24) sheet 1 of 13 it will appear that odd numbered sections were granted to the Northern Pacific Railroad *"less the river" i.e.,* on sheet 1 of 13 (of Map) the odd numbered sections 27 and 29 are set out "N.P.R.R. Volume 4, page 9 *Section 21* LESS THE RIVER." See 30 Stat. 597.

A careful examination of the patents to the Railroads contained in appellee's exhibit to its Answer (R. 84-86) consisting of copies of all patents to the Railroads reveals that each patent excepts "Indian Title" and the river itself. Therefore, the "Indian Title" to the River itself has never been extinguished by any form of transfer whatsoever. See 13 Stat. 365 and 34 Stat. 197.

All of the patents described in Appellee's Answer (R. 84, 85, 86) except the water rights and therefore the Public Land, Homestead and Railroad patents have never extinguished appellant's "Indian Title" (appellee's brief, pages 6, 7, 8).

Table of Odd Sections Granted Railroads "Less The River"

Cursory examination of appellee's map Ex. No. 1 (R. 24, 25) and of all Railroad patents will show that all odd numbered sections abutting the river were conveyed *"less the river"* to Northern Pacific Railroad Co. and in addition to this exception each patent expressly reserves prior water rights:

Map Ex. No. 1	*List of Odd Sections*	
Proj. Map of	*Less River*	*Map Page*
Land Patents	Sec. 9, 21, 29, all *"less the river"*..	1 of 13
" "	Sec. 9, 11, 3, all *"less the river"*....	2 of 13
" "	Sec. 3, 35 and 11 *"less the river"*..	3 of 13
" "	Sec. 1, 11, 7, all *"less the river"*....	4 of 13
" "	Sec. 9 and 7, all *"less the river"*..	5 of 13
" "	Sec. 11, 13, 23 and 15, all *"less the river"*	6 of 13
" "	Sec. 13 and 19, all *"less the river"*	7 of 13
" "	Sec. 33 and 29, all *"less the river"*	8 of 13
" "	Sec. 35 *"less the river"*.....	9 of 13
" "	Sec. 1, 11, 31, all *"less the river"*..	10 of 13
" "	Sec. 29, 31, 33, 5, all *"less the river"*	11 of 13
" "	Sec. 3, 11, 33, all *"less the river"*..	12 of 13
" "	Sec. 29, 33, all *"less the river"*.....	13 of 13

It will be noted on sheet 1 of 13 that the MAYFIELD DAMSITE is situated on parcels 9 and 11 in Section 29, which section was granted to the Northern Pacific Railroad by patent from the United States which patent excepted THE RIVER and all INDIAN TITLE. Therefore, this patent was issued to this section 29 "LESS THE RIVER" and the MAYFIELD DAM is being built by appellee across this river on land to which appellants are seized by reason of their aboriginal possession or title which was preserved by the patents. These patents also preserve all prior water rights so appellants have three separate and distinct bases for their title to the river and the Cowlitz water shed.

Appellee's acts interfere with appellant's use of their water rights on the river including interfering with their fisheries and their navigation of said river

under section 401 of the Rivers and Harbors Act, 16 USCA 797 and the Federal Power Act, *supra,* which is also a violation of due process under the 14th Amendment.

Protection of Indians 25 USCA 177

In reply to appellee's contention that all of appellant's rights have been extinguished and Congress intended to extinguish them by implication, 25 USCA 177 is cited:

> "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by Treaty or convention entered into pursuant to the Constitution."

Here appellee seeks to make an involuntary conveyance of appellant's Tribal Lands by (1) a taking without compensation or (2) a taking by eminent domain, which is in direct violation of the foregoing statute.

The taking of appellant's rights in the Cowlitz River and Cowlitz River Watershed violates this statute and is contrary to the Constitution and to the Fifth and Fourteenth Amendments thereto. It is interesting to note that the United States Army Engineers paid in excess of $15,000,000 to the Yakima and Celile Indians for fishing rights on the Columbia River.

CONCLUSION

The District Court has jurisdiction where appellee seeks to deprive an Indian Tribe of its rights by denying the Appellant due process of law guaranteed under the 5th and the 14th amendments. Appellee is in no

better position than the ordinary shop keeper, the only difference is that the appellee is acting as a merchandiser of electrical power and is acting wholely in its proprietary capacity. Appellant's rights are spelled out under the exceptions in the patents and patent acts and the disclaimer in the Washington State Enabling Act, and the Washington State Constitution Article XXVI.

Respectfully submitted,

MALCOLM S. MCLEOD
861 Dexter Horton Bldg.
Seattle 4, Washington

JAMES E. SAREAULT
Bush Building
Chehalis, Washington

FREDERICK PAUL
755 Dexter Horton Bldg.
Seattle 4, Washington
Attorneys for Appellant.

VINCENT ABBEY
904 Arctic Building
Seattle 4, Washington

THOMAS TWOHIG
70A Fremont Extension
Seaside, California
Of Counsel.